No. 80-502

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

ROGER R. FLOREY, on his own behalf and on behalf of his minor son, JUSTIN B. FLOREY; DAVID R. GROETHE, MARILYN DAY, EVELYN GRIESSE, and MARILYN FUSFIELD,

Petitioners,

v.

SIOUX FALLS SCHOOL DISTRICT 49-5; RICHARD L. BOHY, President of the Board of Education; DORIS LARSON, DAVID BRANDT, PAM NELSON and JOHN SIMKO, JR., Members of the Board of Education and DR. JOHN W. HARRIS, Superintendent of Schools and their agents, employees and successors,

Respondents.

REPLY BRIEF

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Argument

Petitioners file this Reply in order to correct misstatements of fact made in Respondents' Brief in Opposition (hereinafter Respondents' Brief).

Respondents claim (Respondents' Brief at 4) that "the /holiday/ programs consisted primarily of secular holiday music and /a/lso included some traditional Christmas carols." This attempt to portray the programs as containing only isolated religious elements is not an accurate description of those programs, as we explain in detail in the Petition for Certiorari pp. 7-11; 23-25. As the record plainly demonstrates, Respondents' Christmas programs contained substantial religious elements, including songs, plays and allegories. Every one of Respondents' Christmas programs emphasized the religious significance of Christmas, either through

drama or song. But in any event, this case does not turn on whether programs consist primarily or only substantially of religious elements. Even if the holiday observances contained only substantial religious elements, Petitioners submit their performance in the public schools, as part of the observance of a religious holiday, violates the Establishment Clause.

Second, Respondents claim (Respondents' Brief at 5) that "Petitioners' case-in-chief consisted primarily of the introduction of evidence concerning the impact certain components of school Christmas programs might have on three individuals" who were not students, and therefore that there was a failure of proof of an effect of advancing religion. This is also untrue. To begin with,

plaintiffs introduced, by stipulation, the holiday programs of all but two or three of the Sioux Falls public schools. Second, the testimony as to the existence of this effect was not at all tentative. Plaintiff Roger Florey testified (by affidavit) that the Christmas programs being conducted in his son's public school had an impermissible religious effect on him and his son. (Affidavit of Roger Florey, appended to the complaint). Two other parents testified similarly with respect to their children. One of these parents considers school Christmas programs to be "a sacrilege" and refuses to allow his six-year-old son to participate in them. Tr. 27-29. The other parent, who has three children in the school system, testified that, as a devout Christian, he objected to public schools' activities

designed "to reinforce the faith of my family." Tr. 39-40, 44.

Respondent's own witnesses also conceded that the school Christmas programs had a religious effect on people in attendance. The School District's Music Director acknowledged that, for persons attending the Christmas programs, the singing of Christmas carols would have the same effect as their singing in a church. Tr. 93. The Superintendent of Schools agreed. Tr. 73-75. Ray Loftesness, Respondents' musicologist, admitted that school Christmas programs containing religious songs will have a religious effect because "you can't escape what the words say." Tr. 110. Susan Henkin McGowan, Respondents' other witness, agreed. Tr. 116-17. A great deal of evidence was introduced, then, to show that public

school Christmas programs have a religious effect, either pro or con, on people who attend or perform in them. Indeed, not a single witness denied the existence of this religious effect.

Moreover, several of the complainants sued in their capacities as taxpayers. The fact that these programs had a significant sectarian component, and used tax funds to place the imprimatur of the school system on religion, had the effect of using tax moneys to advance religion. Thus, even disregarding the religious effect those practices had on school children, the programs had the effect of advancing religion in a manner forbidden by the Establishment Clause.

When all is said and done, certain facts are uncontested. In 1978, second grade students in a Sioux Falls public

school performed a play which instructed these students that "the Babe in the manger is a gift to the world;" a first grade class performed a play in which they tried to decide what gifts to bring Jesus on His birthday; other first grade students performed a play in which they debated the question of who played the most important role at Jesus' birth. Either these activities, fully documented in the record, violate the Establishment Clause or they do not. The court below saw no Establishment Clause violation. Petitioners ask this Court to review that judgment.

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